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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 46.

J. M. ROBINSON & CO.,
Plaintiffs in Error,

vs.

J. C. BELT AND C. M. KING,
Defendants in Error.

Now come the plaintiffs in error and respectfully move and pray the Court to grant them a rehearing herein, and for grounds for this application show and represent:

That on the hearing heretofore had in this court in this cause they, the plaintiffs in error, contended that the judgment in this cause should be reversed, (1) because there was no evidence of the acceptance of the assignment in question herein by any of the creditors who were preferred by that assignment; and (2) because the judgment rendered in this cause included a personal judgment against the plaintiffs in error for the proceeds of the property in contro-

versy; but that this court did not consider these contentions, which were duly assigned as error, because it was of the opinion that "neither of them appears to have been called to the attention of the courts below," and for no other reason.

With respect to the first of these contentions the plaintiffs in error submit that it appears from the record herein that the trial court was specifically requested by them, upon the close of all the testimony, to direct the jury to find a verdict in their favor, but refused so to do, and that the plaintiffs in error thereon duly saved exceptions to such refusal (printed record, pages 49 and 56); and, furthermore, that after such refusal the plaintiffs in error again requested the Court to instruct the jury as follows: "The Court instructs the jury that there is no evidence in this case to sustain the claim of the interpleader, and you will find your verdict in favor of the plaintiff J. M. Robinson & Co.;" that this instruction was refused, and that the plaintiffs again excepted (printed record, pages 56–57); and that, while the assignment of errors which was, or should have been, filed in the United States Court of Appeals in the Indian Territory does not appear, nevertheless the record in this court does show that the foregoing rulings were expressly assigned as error in the assignment of error filed in the Circuit Court of Appeals for the Eighth Circuit (see tenth and twelfth assignments of error on page 70 of printed record). And plaintiffs in error state that, in contending in this court that the interpleader was not entitled to recover, because there was no evidence of any acceptance of the deed of assignment, they proceeded upon the view that a request for an instruction, that there was no evidence to sustain the claim of the interpleader, warranted that contention.

With respect to the second of the foregoing contentions, namely, the point that a personal judgment against the plaintiffs in error was not warranted in the case at bar, the plaintiffs in error respectfully submit:

1. That they were entitled to raise this assignment of error in this court, even if it was not presented in the lower courts, since it was a question of jurisdiction, and since such question can be raised in this court for the first time;

2. Because the question is not only one whether the pleadings warrant the judgment, but even one which is at the foundation of the judgment and underlies the right of recovery which that judgment asserted and effectuated, and one of which the lower courts were bound to take judicial cognizance; and because a question of that character can also be raised in this court, even though the attention of the trial court has not been directed thereto;

3. Because the question was in fact raised in the trial court and in both of the intermediate appellate courts, namely, the United States Court of Appeals for the Indian Territory, and the Circuit Court of Appeals for the Eighth Circuit; and because the record herein so shows;

That a question of jurisdiction may be raised for the first time in this court is a proposition which will be at once conceded. Is not the jurisdictional character of the objection, now under consideration, to the judgment in this cause equally apparent?

The proceeding under review is purely statutory. It receives its warrant from the statute alone; the statute defines its extent and limits. What the statute authorizes the court may do; nothing else. The objection to the judgment is one as to the power of the court to render the judgment; in form and substance it is, therefore, jurisdictional.

"The proceeding of interpleader, in an action of attachment, in somewhat *sui generis*. It is solely the creature of the statute." (*State ex rel v. Barker*, 26 Mo. App. p. 491.)

And said the Supreme Court of Missouri in an action in which a verdict for the value of the attached property had been rendered in favor of the interpleader under a statute substantially the same as the one controlling the proceeding at bar:

"This verdict was a mere nullity, and the Court should have set it aside." (*Mills v. Thompson*, 61 Mo. p. 417.)

"When a court of general jurisdiction is invested by statute with special powers to be exercised, not through its ordinary process and modes of procedure, but in an extraordinary mode prescribed by statute, neither the jurisdiction nor the remedy is to be extended beyond the legislative grant; but the proceedings of the court must be regarded as those of a court constituted with special and limited jurisdiction, and will be held invalid if the facts conferring jurisdiction do not appear." (*Drake on Attachment*, 7 Ed. Sec. 87, p. 71, citing *Williamson v. Berry*, 49 U. S. 495 and other decisions of this Court.)

In the case at bar the authority or power exercised does not even depend upon any special facts; it does not exist under any circumstances.

But the cases in which an objection may be raised for the first time in this court are not limited to jurisdictional matters. They extend to an objection that a statute on which the judgment is based has been repealed (*Bank v. Francklyn*, 120 U. S., pp. 750, 751); also to an objection that the pleadings do not warrant the judgment (*Kentucky, Etc., Co. v. Hamilton*, 22 U. S. App. 386; *s. c.* 11 C. C. A. 42;

Cyclopedia of Law and Procedure, Vol 2, p. 691, title Appeal and Error, and numerous cases there cited, as well as in *Century Digest*, Vol. 2, p. 1710, Sec. 1232, title Appeal). The ruling in *Kentucky, Etc., Co. v. Hamilton, supra*, is predicated upon the following holding, quoted therein from the opinion of Chief Justice Marshall in *Slacum v. Pomeroy*, 10 U. S. 221:

> "It is not too late to allege as error in this court a fault in the declaration which ought to have prevented the rendition of the judgment in the court below."

When error does not arise upon the record proper, it must always be preserved by exception, and thus be brought to the attention of the trial court; but, when it does arise upon the record proper, when it appertains to the essence of the controversy, and, above all, when it could not have been obviated in the trial court consistently with the relief afforded—and these are the features attending the present question—then, it is submitted, appellate courts will not hesitate to take cognizance of it in the first instance.

That the objection under consideration was, moreover, amply presented in the trial court, and in both the intermediate courts, appears from the following references to the printed record.

Immediately after the commencement of the trial herein counsel for the interpleader asked a witness to state the value of the property which had been attached. Thereupon counsel for the plaintiffs in error objected. The nature of the objection is not specifically stated in the record, but the record merely recites that "a lengthy argument occurred between counsel, the conclusion of which was as follows:" Here follow remarks by the Court which show,

beyond doubt, that the objection was on the very ground which is now under consideration, and that at the time the Court considered the objection well taken, but merely admitted the evidence for the purposes of an appeal. From the remarks of the Court we quote the following:

> "The Court: It seems to me that much of the argument of counsel, and it has been very exhaustive and able, has related to cases or conditions which might have arisen and remedies which they might have availed themselves of, if they had desired to do so and if they had availed themselves of these remedies they could have pursued them as these authorities have indicated, but this is a special remedy under a special statute and is known as interplea and at the time this interplea was filed here there was nothing for them to claim except a portion or all of the proceeds that were in court. If they had desired to hold the Marshal responsible for trespass they should have instituted proceedings to that end. * * * Under this special remedy here it seems to me that claim must be confined to the proceeds that were in court. The interpleader asks for a specific thing, that is property in court at the time he filed his petition. * * * All that you can reach at this time is the funds which have been collected. * * * I am, however, inclined to formally overrule the objection notwithstanding my opinion now and let all the facts go to the jury. * * * Out of great caution, as this has already gone up to the Appellate Court once, and will probably go up again, this Court desires to avail itself of all the light possible before all the evidence is introduced. Therefore, I will allow the gentlemen to establish that fact.
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> "To which ruling of the Court plaintiffs, by their counsel, then and there excepted." (See printed record, pp. 27 and 28.)

This ruling plainly raised the objection and plainly contained a ruling on it; but, inasmuch as that ruling was not put to avail, in that the verdict was not for the value of the attached property, and in that the personal judgment was not for that value, but that both were for the total proceeds derived from the sale of that property, the ruling furnished no real basis for assignment of error.

The same objection, however, arose upon the termination of the trial, when the parties presented their requests for direction to the jury. The record shows that the plaintiffs in error then requested the Court to direct the jury to return a verdict in their favor, and that the interpleader then requested the Court to direct the jury to find for him, and also to direct the jury under the proof and the evidence to find the value of the attached property.

The record shows that, after the presentation of these requests, another argument took place, whereupon the Court took a recess until the succeeding Saturday, on which day further arguments took place, and that an adjournment was then had until the following Monday, when a further argument occurred, and that on the latter day, and "pending the argument addressed to the Court on legal questions," the plaintiffs in error obtained leave to amend their answer herein by inserting allegations that the property attached in this cause, and in the other causes mentioned in the judgment herein, had been sold, and that the proceeds of the sale had been paid out under the prior proceedings, to which allusion had been made in the brief hereinbefore filed by the plaintiffs in error.

This amendment commences as follows:

> "The plaintiffs further answering say that the interpleader could not recover in this case because the

> fund for which the property was sold, and which was in court at the time the interplea was filed herein, has been distributed amongst the attaching creditors of said assignor Belt in accordance with the judgment of this Court entered on the sixteenth day of December, 1893, which was as follows:"

And this amendment concludes as follows:

> "And there is now no fund or proceeds in court which the interpleader can recover in this action or to which the interpleader had any right." (Printed record, pp. 49 to 54.)

When this amendment was made, the interpleader demurred orally, and thereupon the court held, "that the amended answer in this particular does not present a legal defense to the interplea in this case," and in the course of its ruling remarked:

> "The court allowed this amendment to be made for the reason that it may be a material fact in the issue, and that this case will probably go to the Circuit Court of Appeals, and perhaps to the Supreme Court of the United States, no matter how it may be decided now. Therefore, in order to present the whole issues that may be presented in this case, the court has allowed this amendment to be made subject to the exceptions of counsel as to whether it does or does not present a legal defense to the pleading."

After this ruling was announced the plaintiffs in error offered to prove that the fund realized from the sale of the attached property had been distributed and paid out in accordance with the judgment of the court entered on the sixteenth day of December, 1893. To this offer the interpleader objected; the court sustained the objection; and the plaintiffs in error excepted. (Printed record, pp. 54, 55 and 56.)

Thereupon the trial was concluded and the court gave its instructions to the jury. The first of these

instructions, the same being given by the court of its own motion was as follows:

> "First. That the interplea filed in this case by C. M. King states a good cause of action for the recovery of the attached property or its proceeds; and if the jury believe from the evidence that the averments in said interplea are substantially true, they will find for the interpleader C. M. King." (Printed record, p. 57.)

Under this instruction the jury by its verdict found the issues in favor of the interpleader and also found "that the proceeds arising from the sale of the attached property was seventy-nine hundred dollars ($7,900.00);" and it was on this verdict that the personal judgment for $7,900.00 against the plaintiffs in error was entered. (Printed record, page 22.)

The plaintiffs in error respectfully submit to this Court that the foregoing references to the record herein show that the trial court was fully advised by objection of the contention of the plaintiffs in error, that the proceeding herein did not warrant any personal judgment, but that the right of recovery could not in any event be other than for the proceeds of the attached property; in other words, that the present proceeding was an intervention to establish the title of the interpleader to the attached property, and not in any sense an action for damages for the levy thereon. Aside from the objection at the outset to evidence of the value of that property, and the remarks of the Court at the end of those objections, showing this clearly, does it not also appear from the subsequent proceedings? Of what other use would be the amendment allowed to the answer of the plaintiffs in error that the interpleader could not recover because the proceeds of that property had been distributed, and that there were no longer funds or proceeds in court which the interpleader could re-

cover; what other purpose or object can be assigned to the oral offer of the plaintiffs in error to show by evidence that the fund in court had been distributed and paid out? That the court understood this to be the object appears from its remarks when this evidence was offered; for it said (printed record, page 50):

> "The only object I can see now for introducing this would be to guide the court in any judgment it might give."

By pleading that the interpleader could not recover because the proceeds of the property attached had been disposed of, the plaintiffs in error necessarily asserted that there could be no judgment other than that for the fund. In short, their position in this matter and in the offer of proof was, first, that there could be no personal judgment in this case, but that the statute under which this proceeding was had warranted only judgment for *res* attached; and, secondly, that there could not in this case be a judgment for that *res*, because it had gone out of the custody of the court.

In this court the plaintiffs in error have adhered to their first proposition, but have abandoned their second; this is the only difference between their position in the trial court and in this court.

Again the instruction given by the court to the jury that the interplea stated a good cause of action for the recovery of the attached property or its proceeds, followed as it was by a verdict finding the amount of the proceeds and a personal judgment for that amount, specifically raises the question of the right of the Court to render that personal judgment. Under the conditions existing at the time of this instruction the interpleader was not entitled to recover

those proceeds from the plaintiffs in error, but only entitled to a restoration of so much of those proceeds as the plaintiffs in error had obtained.

The printed record herein further shows that the foregoing matters, and the question which arose concerning them, were brought to the attention of the Court of Appeals for the Indian Territory. That court, in its opinion, refers to the amendment which was made by plaintiffs in error to their answer to the interplea, and also refers to the fact that it was claimed in this amendment that there was no fund which the interpleader could recover (printed record, p. 62); it also refers to the offer of plaintiffs in error to show that 87 per cent of the proceeds of the attached property had been distributed, and sustains the rejection of the evidence (printed record, p. 66); and it also refers to and upholds the first instruction hereinbefore mentioned, which authorizes the recovery for the proceeds of the attached property. (Printed record, p. 66.)

In the Circuit Court of Appeals for the Eighth Circuit the refusal of the Court to allow the introduction of evidence of the distribution of 87 per cent of the proceeds of the attached property among the attaching creditors is specifically assigned as error, as is also the giving of the first instruction hereinbefore referred to. These assignments of error are respectively numbered fourth and fifth. (Printed record, p. 69.)

The plaintiffs in error hereinbefore have undertaken to show that the objection to the entry of a personal judgment was, in a legal sense, brought to the attention of the trial court, and of both the intermediate courts of appeal. They have no thought of claiming that, if this did not appear from the record herein, they could establish it *dehors* the record.

But, having shown that this does not appear from the record, they desire, and take occasion, to refer to the brief filed on their behalf in the Circuit Court of Appeals for the Eighth Circuit for the purpose of showing, as a matter of fact, that their argument in the Court of Appeals embraces their objection to the entry of a personal judgment. For this purpose they have obtained, and they will file herewith, one of their printed briefs, which was filed in the Court of Appeals for the Eighth Circuit, and which contains the file mark of the Clerk of that Court; and they respectfully call the attention of the Court to the concluding pages, namely, pages 21 and 22 of that brief, and, as a matter of convenience, quote the following therefrom:

> "Therefore, at the time of the trial of this interplea, and the rendition of the judgment in this case, there was no fund in court to litigate about, and the Court, therefore, erred in rendering a personal judgment against the attaching creditors for the full proceeds of sale originally turned into court by the marshal, which was the sum of $7,900.00; whereas, the plaintiffs themselves had only gotten 87 per cent of that amount. The Court could not, under the law, render a personal judgment against these plaintiffs in the trial of the interplea for that or any other sum. *Jefferson v. Dunavant*, 53 Ark 133; *Fly v. Grieb's Administrator*, 35 S. W. 214; *Williams v. Braden*, 57 Mo. App. 317; *Jennings v. Hoppe*, 44 Iowa 205; *Bicklin v. Kendall*, 34 N. W. 283. Since the foregoing was prepared, we have seen a certain decision of this Court, not yet reported, which we think absolutely settles this case. In *Swift v. G. S. Russell, Interpleader*, 97 Fed. ...., this Court said: 'The recovery which the interpleader can secure in this proceeding must be limited to the proceeds of the attached property and the cost of the proceeding.' As the Court there well said, 'this is a proceeding for a distribution of the property or money

in the custody of the Court, and not for the recovery of either from any person or party.' Therefore no money judgment could be properly rendered against the plaintiffs. The Court only had jurisdiction to act on the interplea by virtue of having the fund in its custody. When that fund had been distributed its acts were *coram non judice.*"

Although the rules of this court entitle the plaintiffs in error to file their motion for rehearing during the present term of the court, they feel that they ought to say, in explanation of the delay which has ensued since the rendition of the opinion herein by this court, that, when they first heard of the affirmance of the judgment of the trial court by this court, they had no intention of filing any such motion; and that they only concluded to file the same after the opinion of this court was published, which was in the course of the present month, and they learned therefrom that such affirmance was predicated by this court on the hypothesis that the objections under consideration had not been raised in the lower courts.

Wherefore plaintiffs in error pray for a rehearing herein, and also pray, that if a mandate has been issued from this court the same may be recalled.

Respectfully submitted.

DAVID GOLDSMITH,
Attorney for Plaintiffs in Error.

I certify that the foregoing petition is, in my opinion, well founded, and that it is not made for the purpose of delay.

DAVID GOLDSMITH,
Attorney for Plaintiffs in Error.